

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 136
5630049

BETWEEN JOSHUA SHERBORNE
 Applicant

AND NUTECH SECURITY
 LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: Luke Chandler, Advocate for the Applicant
 Mark Hammond, Counsel for the Respondent

Investigation Meeting: On the papers

Determination: 3 May 2017

DETERMINATION OF THE AUTHORITY

A. The application of Joshua Sherborne for an investigation of his personal grievance for unjustified dismissal is dismissed without further investigation.

B. Costs are reserved.

[1] This determination explains why an application to the Authority has been dismissed without an investigation meeting being held. The applicant would not attend an investigation meeting in person. An investigation meeting is normally held in the centre closest to where the work was carried out. Here that centre was Tauranga. Through his representative, the applicant insisted he would only participate by telephone or video link from Melbourne, where he now lives, or if the respondent company paid the travel and accommodation costs for him attend an investigation meeting in Tauranga in person. For reasons given in this determination, the applicant's position prevented the Authority carrying out a suitable investigation of his claim. Because this was the result of the applicant's actions and decisions, the appropriate step was to dismiss his application. If he wishes to pursue his claim, he

would need to file a challenge to this determination in the Employment Court and have his case heard in that forum.

Employment Relationship Problem

[2] Joshua Sherborne worked for Nutech Security Limited (NSL) as a communications operator in Tauranga from 23 May 2013 until he was dismissed on 9 March 2015 for serious misconduct. His duties included monitoring client alarm systems and answering phone calls. He was dismissed for a ten-minute delay in attending to a fire alarm call from a client's premises on 25 February 2015.

[3] In a letter to NSL dated 17 March 2015 Mr Sherborne raised a personal grievance for unjustified dismissal. NSL operations manager Simon Gray responded on 18 March 2015. Mr Gray wrote that if Mr Sherborne "wish[ed] to take this matter through to mediation, then I'm sure we will hear from you again in due course".

[4] Eleven months later, on 17 February 2016, Mr Gray received a request from a Ministry of Business dispute resolution co-ordinator to attend mediation in Tauranga on 29 or 31 March 2016. By that time Mr Sherborne lived in Auckland. Mediation did not go ahead then because he wanted to attend by telephone and NSL said it did not believe the matter could be resolved without him present in person.

[5] Mr Sherborne subsequently changed representatives. His new representative, Luke Chandler, contacted NSL in July 2016. Arrangements were made for mediation in Tauranga on 1 September 2016. Mr Chandler attended in person as did Mr Gray and NSL's managing director Keith Margan. Mr Sherborne was not there. Mediation did not go ahead.

[6] On 28 October 2016 Mr Sherborne lodged a statement of problem seeking an Authority investigation of his personal grievance. NSL lodged a statement in reply on 22 November 2016, after getting an extension of time to do so. In late November the Authority referred to the parties to mediation. However no resolution resulted from the referral and, on 24 January 2017, Mr Sherborne's representative asked the Authority to proceed with an investigation. An Authority case management conference did not occur until 31 March 2017 as Mr Sherborne's representative said he was not available for an earlier date offered. Prior to that telephone conference the

Authority advised the representatives that dates of 11 and 12 May had been reserved for an investigation meeting in Tauranga.

[7] During the 31 March 2017 case management conference NSL's representative asked if Mr Sherborne would attend the investigation meeting in Tauranga. Mr Sherborne's representative then sought agreement that Mr Sherborne attend by telephone or Skype (or some similar connection). NSL opposed such an arrangement.

[8] Mr Sherborne's representative had Mr Sherborne, who was in Melbourne, on the telephone call with him. Mr Sherborne spoke briefly and said it was too expensive for him to travel to Tauranga and he would also lose pay as he was not yet entitled to annual leave from his job in Melbourne. Mr Sherborne's representative also referred to an Authority determination in another matter where an applicant party had been permitted to attend an investigation meeting by Skype.

[9] During the call I explained that a party was usually expected to attend the Authority's investigation meeting in person. This was in order to enable the Authority Member to test the party's evidence and also to enable the other party's representative to have the opportunity to test that evidence by way of cross examination. This was particularly important where questions of credibility were at issue, as they would be in Mr Sherborne's application due to different accounts of relevant events evident from the statement of problem and statement in reply. The credibility of Mr Sherborne's evidence and that of witnesses for NSL (likely to be Mr Gray and Mr Mangan) would be central to determining what was more likely than not to have occurred. This exercise was unlikely to be satisfactorily done by a telephone or Skype interview of Mr Sherborne.

[10] Some exceptional circumstances may warrant an alternative arrangement. I was not satisfied there were sufficiently exceptional reasons to excuse Mr Sherborne's attendance in person that outbalanced the other considerations. Other applicants bear their costs of travelling to the venue of their investigation meeting, from Australia and elsewhere in New Zealand. I declined the application for Mr Sherborne to attend only by telephone or audio-visual means, such as by Skype.

[11] After a brief break in the call for Mr Sherborne and his representative to confer, Mr Sherborne advised that he would ask his representative to make a complaint to the Chief of the Authority about that decision. Although a complaint to

the Chief is not a means of changing an Authority Member's decision on how to conduct an investigation meeting, I adjourned the matter for two weeks so Mr Sherborne's representative had the opportunity to complain. I also advised that after that two week period, in the absence of any change in the situation or other information meanwhile, I anticipated Mr Sherborne's application would likely be dismissed for not sufficiently progressing his case. Nothing changed in that time.

[12] On 20 April I advised the parties that they could make further submissions before I made a decision on whether to dismiss Mr Sherborne's application without further investigation. A timetable to do so was set. Mr Sherborne's representative lodged written submissions on 20 April and 1 May. NSL's representative lodged a submission on 1 May. I considered those submissions before reaching the conclusions set out in this determination.¹

The Authority's role, powers, jurisdiction and procedure

[13] The Authority is an investigative body with the role of resolving employment relationship problems by establishing the facts and making a determination according to the substantial merits of a case, without regard to technicalities.² In carrying out that role it must comply with the principles of natural justice and promote the objects of the Employment Relations Act 2000 (the Act). Those objects include promoting good faith behaviour and addressing the inherent inequality of power in employment relationships.³ It must act as it thinks fit in equity and good conscience as long as it does not do anything inconsistent with the Act.

[14] The Authority has wide powers to carry out its investigative role.⁴ These include the power to require a party or person to attend an investigation meeting to give evidence and to fully examine any witness in the course of an investigation meeting. In doing so it may follow whatever procedure the Authority considers appropriate. In this context the Authority means one Member.⁵

¹ Employment Relations Act 2000, s 174E.

² Employment Relations Act 2000, s 157.

³ Employment Relations Act 2000, s 3.

⁴ Employment Relations Act 2000, s 160.

⁵ Employment Relations Act 2000, s 166(2).

[15] While the Authority may take into account such evidence and information as it thinks fit, whether strictly legal evidence or not, it must allow cross-examination of a party or person by the other party's representative during an investigation meeting.⁶

[16] In exercising its powers and performing its functions the Authority must act in a reasonable manner in carrying out its investigative role, which includes applying the principles of natural justice.⁷ This includes the discretion to meet with the parties at times and places fixed by a Member of the Authority and to exercise the Authority's powers in the absence of one or more of the parties.⁸ The Authority has powers to take evidence at a distance.⁹

[17] The Authority is expressly permitted to determine a matter without holding an investigation meeting. If it does so, the Authority must provide a written determination.¹⁰

Right of challenge to the Employment Court

[18] The issue of the written determination triggers an important statutory and constitutional safeguard on the exercise of the Authority's powers. Within 28 days of the date of the determination a party may elect to have the matter heard by the Employment Court.¹¹ This is referred to in the Act as a challenge, rather than an appeal. A party may elect to have the Court hear the whole matter or only some specified matters of fact or law. The point of particular importance is that a party dissatisfied with the outcome of the Authority's exercise of its extensive powers to investigate and determine matters then has further access to justice, this time applying the adversarial methodology of the courts.

[19] There is a limit on access to the Court over Authority determinations, or part of a determination, that concern the procedure that the Authority has followed or intends to follow.¹² This limit does not apply where the Authority's determination has determined the substantive rights of a party.¹³

⁶ Employment Relations Act 2000 s 160(2) and (2A).

⁷ Employment Relations Act 2000, s 173(1).

⁸ Employment Relations Act 2000, s 173(2) and (5).

⁹ Employment Relations Act 2000, Schedule 2, clause 7.

¹⁰ Employment Relations Act 2000, s 174D.

¹¹ Employment Relations Act 2000, s 179.

¹² Employment Relations Act 2000, s 179(a).

¹³ *H v A Limited* [2014] NZEmpC 92 at [28].

[20] In Mr Sherborne's situation, where the Authority has dismissed his application entirely, this determination has reached a conclusion affecting his substantive rights to have a personal grievance considered under the Act. The Authority's investigation is finished. As a result, he is entitled to file a challenge to this determination in the Employment Court within 28 days of its date of issue. The Court may hear and decide his whole case, if he chooses to ask it to do so. His access to justice, if it has in any way been improperly denied by this determination, is thereby preserved, as contemplated by the Act.

Why attendance by telephone or audio-visual link was unsatisfactory?

[21] I reached the view that the Authority could not satisfactorily investigate Mr Sherborne's application by phone or an audio-visual link (AVL) such as Skype or Facetime because of the particular circumstances of his case and the nature of the proceedings.

[22] The starting point for all Authority investigations is that the parties, their representatives and necessary witnesses will attend the investigation meeting in person. This may be varied due to a particular situation, circumstance or need in the case. In every case an arrangement for interview of a party or a witness by telephone or AVL means is a result of an assessment by the Authority member of whether that is satisfactory for her or his purposes in that particular case. The assessment balances the requirements of natural justice, acting reasonably, and allowing for full examination of a party or person by the Authority Member and cross examination by the other party's representative. Not every case is the same and the result of the assessment will vary according to the particular mix of the factors and circumstances in each one.

[23] A review of the determinations of the Authority, publicly available through the Employment Law Database, show many cases where a party or witness has been interviewed by telephone or AVL means.¹⁴ This arrangement is more likely to be permitted where what a witness might say is not central to the case. A number of others involved the respondent party, frequently the employer.

¹⁴ <http://apps.employment.govt.nz/determinations/>

[24] It is clear from reading such determinations that the Authority has sometimes used telephone and Skype interviews as a way of engaging a respondent who would otherwise be unavailable and delay resolution of the applicant's case. These are some examples. In *Johnston v Smith t/a Rosa Giardino Montessori Nursery School* the Authority member engaged with an employer, who was a reluctant respondent, by a Skype connection to Sweden during June 2015.¹⁵ The employer was not returning to New Zealand until 2016. In *Cardno v NCF International Ltd* a witness on behalf of the employer gave evidence by Skype from China, with the assistance of an interpreter of Mandarin.¹⁶ In *Chaney v Surreal Ltd* the respondent employer's director was granted leave to give evidence by Skype from China.¹⁷ She was said to have returned there due to her father being ill and she could give no firm date for a return to New Zealand. No successful Skype link was made and the director then participated by telephone.

[25] Cases where an applicant party has been excused physical attendance at the investigation meeting are rarer. One example is *Nguyen v Ta t/a Little Saigon Restaurant*.¹⁸ The two applicants were brothers employed in a Vietnamese restaurant in Christchurch. One brother gave evidence by Skype from Hanoi. However the other brother was physically present at the investigation meeting and gave evidence there, as did a lawyer who had represented the brothers at the time of their employment.

[26] Mr Sherborne sought to rely on another Authority determination for the proposition that he had the option or choice as an applicant to attend by telephone or AVL means. However that case, *Dillon v Logical Systems Limited t/a Yoobee*, really illustrated the nature of the particular assessment that an Authority Member may make to permit such an arrangement, to achieve justice in the particular case.¹⁹ Mr Dillon was permitted to attend by Skype because delays in his former employer responding to his application meant the investigation meeting could not be held before Mr Dillon's work visa expired and Mr Dillon had to leave the country. He also lived further afield than Australia. He returned to the United States and was in China by the

¹⁵ [2015] NZERA Christchurch 104.

¹⁶ [2014] NZERA Wellington 10.

¹⁷ [2013] NZERA Christchurch 250.

¹⁸ [2014] NZERA Christchurch 173.

¹⁹ [2014] NZERA Christchurch 188.

time that the investigation meeting was held. It had been further delayed by unsatisfactory conduct by the former employer.

[27] Such circumstances did not apply to Mr Sherborne. His employer was not responsible for the delays in progress on his case. There was no information suggesting Mr Sherborne had to leave New Zealand for any visa-related reasons or could not return here for some such reason.

[28] In considering the prospect that Mr Sherborne should be permitted to attend by telephone or AVL means only, I considered the case law and statutes that apply to similar considerations to the courts, both the Employment Court and the general civil courts. The Evidence Act 2006 and the Courts (Remote Participation) Act 2010 did not apply to the Authority but the general principles and provisions in those statutes can assist in determining some points, where applicable to the Authority's different investigative powers and procedure. The Evidence Act, for example, allows for evidence by audio visual link from Australia.²⁰ Sections 5 and 7 of the Courts (Remote Participation) Act set out criteria for a judicial officer to consider in determining whether or not to allow the use of AVL for the appearance of any participant in a proceeding. Considering criteria drawn from those sections identified four points that weighed, in my assessment in this case, in favour of requiring the parties and witnesses to attend in person and declining Mr Sherborne's request to attend by telephone or AVL.

[29] Firstly, the nature of the proceeding was a substantive claim for findings of unjustified dismissal. An award of remedies could comprise many thousands of dollars for lost wages and distress compensation. It was a matter in which there was, as apparent from the statement of problem and statement in reply, likely to be significant dispute in the evidence about how the dismissal came about and why. It was not a proceeding on an interlocutory point or one where matters in dispute could likely be resolved solely from external or objective evidence, such as cases about whether the minimum wage or holiday pay had been properly paid. As a result the Authority would need to exercise its investigative powers to closely test and assess the evidence of the witnesses in order to make findings.

²⁰ Evidence Act 2006, ss 168 – 172.

[30] Secondly, the use of telephone and Skype connections may restrict the quality of evidence gained from witnesses. An investigation meeting involving at least three witnesses was likely to take the better part of a day, along with closing submissions from the representatives. Skype connections, for example, are sometimes lost or deteriorate in quality over long periods. Reconnecting interrupts questioning and is unhelpful, particularly during periods of an investigation meeting where an Authority Member or a party's representative is pressing a witness to test the reliability of their evidence.

[31] In some centres the Authority can arrange access to more sophisticated video conferencing facilities, such as a limited number available at Ministry of Business offices in the main cities. The alternative of commercial facilities, including ones that could connect between a facility in a New Zealand city and Melbourne, are costly. As the party seeking to have that arrangement used Mr Sherborne would be responsible, at least initially, for meeting that expense. It was unlikely, on what was said to be his limited budget, that he would readily meet the burden of doing so.

[32] Thirdly, the limitations of telephone and Skype technology had a potential impact on the use of the Authority's powers to "fully examine" a person or party and on the other party's right to cross-examine a witness. The courts, in various cases, have accepted that satisfactory testing of the credibility of a participant can occur through the use of AVL technology. An example is *Ra Ora Stud Ltd v Colquhoun* where Justice Fisher in the High Court said closed circuit television could provide an adequate opportunity to assess the nuances of the giving of the evidence and, in particular, credibility.²¹ However the technology used in such cases in the Court is also subject to detailed rules about screens being available to the judicial officer and the parties' representatives, involving a level of sophistication and cost beyond what was likely to be available for the Authority's investigation meeting of Mr Sherborne's claim.²²

[33] Fourthly, consent or opposition by the other party is a relevant factor. NSL opposed Mr Sherborne's request and supported the view that there were questions of credibility that it would want to test, which was best done with him physically present. In the particular context of the Authority's procedures, which are

²¹ (1997) 11 PRNZ 353 at 356.

²² See Evidence Act 2006, s 170.

investigative rather than purely adversarial, the concern of the Member to be able to effectively exercise her or his powers to question, weighs as heavily as the view of either party. In this case that also weighed against Mr Sherborne.

The cost of attending in person

[34] Mr Sherborne submitted that it would cost him around \$1700 if he had to travel from Melbourne to Tauranga and stay there for the Authority investigation meeting. While his estimated costs for fares and accommodation appeared somewhat inflated, such an amount was not sufficient reason to excuse his physical attendance when balanced against the needs of an effective investigation and the interests of the respondent. In acting reasonably the Authority also had to consider NSL's rights to be treated fairly as well. One example might be that the credibility of NSL's witnesses attending in person, Mr Gray and Mr Margan, would be put under a greater degree of scrutiny and pressure than it was possible to place on Mr Sherborne attending remotely.

[35] While the Authority must address the inherent inequality of power in employment relationships, Mr Sherborne's concerns about the cost of attending an investigation meeting about his own application were not so great as to displace the weight that had to be given to other factors.

[36] There was no basis on which the Authority could adopt or impose on NSL Mr Sherborne's proposal that it advance him the costs of travel and accommodation if he had to attend in person. It presumed an entitlement and outcome to his claim that was premature at best. It also suggested Mr Sherborne could not or would not pay an award of costs to NSL if he were unsuccessful in his claim. Such an award could be made against him in New Zealand and enforced in Australia.²³

[37] There really needed to be some factor that was beyond Mr Sherborne's control to warrant remote attendance. NSL was not, on the available information, responsible for him pursuing his claim first from Auckland and then from Melbourne. He was there as a result of choices he made.

[38] Two further High Court examples illustrate the point. In *Yang v Chen* the defendant Mr Chen was permitted to give AVL evidence from China because an order

²³ Employment Relations Act 2000, s 141 and Trans-Tasman Proceedings Act 2010 (Cth), ss 65–79.

of the Chinese Ministry of Justice prohibited him from leaving the country.²⁴ Mr Chen was not only a party to the proceeding, but also a central witness in the case. His evidence was to be subject of very close scrutiny and his credibility was very much in issue. By contrast, in *Ithaca (Custodians) Ltd v Perry Corp*, the Court denied leave for two witnesses to give evidence by video link. They had sought leave on the grounds of work commitments and personal inconvenience.²⁵

The next step: why dismiss Mr Sherborne's application now?

[39] Mr Sherborne gave no indication that, if leave to attend by telephone or AVL means was denied, he would attend the Authority investigation meeting. Rather, as was apparent from what was said by him in the case management conference and for him in the submissions lodged, he resolutely refused to do so. He was advised of the likely consequences of that position in an Authority Minute issued on 31 March after the case management conference and in the email of 20 April to his representative advising of the timetable for submissions. His only concession to the prospect of having to attend in person was that he would do so if NSL met "the full expense".

[40] Natural justice requirements have been met by having heard from the parties, including the written submissions allowed for after 20 April.

[41] I could have set an investigation meeting date and venue in Tauranga, attended there that day and, once Mr Sherborne did not attend, gone ahead and dismissed his application at that time. It was not necessary or reasonable to do so. Mr Sherborne has indicated he would not come. NSL could meanwhile have been put to the cost of preparing and attending, just in case. I could not reasonably go ahead with an investigation meeting anyway to put NSL to the test of justifying the dismissal on the basis of assertions by Mr Sherborne that I could not also satisfactorily test. Rather, I have exercised the power of the Authority to determine a matter without holding an investigation meeting. This had been done after advising the parties of a likely outcome and taking time to consider submissions on that prospect. In light of Mr Sherborne's refusal to participate in an investigation of his application in a way that I considered necessary for the Authority to act reasonably in seeking to establish the facts and make a determination, his application has been dismissed.

²⁴ HC Auckland CIV 2007-404-1751, 13 May 2010.

²⁵ (2002) 16 PRNZ 773.

Other factors

[42] I record that I also considered the following factors in reaching this conclusion, although they were not decisive of the outcome in any way.

[43] Firstly, there was considerable delay in Mr Sherborne pursuing his claim. More than two years ago, in March 2015, NSL responded to his personal grievance and indicated it would wait to hear from him about mediation. He appeared to have done nothing to pursue that option until February 2016. There was also no explanation of why he could not have attended the mediation arranged in March 2016 when he was living in Auckland, from where Tauranga is accessible by a relatively cheap bus fare.

[44] Secondly, Mr Sherborne's statement of problem did not disclose a very strong case. His account of the incident that resulted in his dismissal accepted he had not completed a procedure to call a client contact when the fire alarm call came in. He suggested this was caused by technical limitations in the communication system. However he also accepted that during the following ten minutes he had the internet search engine on his computer open to an online newspaper site. While there was much more that might require investigation by the Authority, including his claim that his "lapse in concentration" resulted from the extended 12-hour shift pattern, his case was not so obviously strong that he could be very confident of its success.

[45] Thirdly, Mr Sherborne submitted that a decision to decline his request to attend by video conference was already made before the 31 March case management conference. This was not so and was unlikely. The topic only arose during the conference call, as the result of a question raised by NSL's counsel. There was no advance notice to the Authority that it might be raised or asked for before then.

Costs

[46] Costs are reserved.

Robin Arthur
Member of the Employment Relations Authority